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A

Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–3268–12 OF 2011
RAMLY ALI, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
14 MAY 2013

C *Civil Procedure — Affidavits — Affidavit in reply — Delay in filing — Affidavit served by appellant after submissions and bundle of authorities filed by respondent — No application for abridgment of time — Whether affidavit admissible — Rules of the High Court 1980 O 32 r 13(2)(b)*

D *Civil Procedure — Appeal — Award of costs — Absolute discretion of trial judge to award costs — Whether appellate court may interfere with costs awarded with trial judge — Whether error of law — Whether wrongful exercise of discretion*

E *Civil Procedure — Costs — Appeal — Absolute discretion of trial judge to award costs — Whether appellate court may interfere with costs awarded with trial judge — Whether error of law — Whether wrongful exercise of discretion*

F *Civil Procedure — Costs — Awards of — Factors in awarding costs — Nature and seriousness of claim — Importance of litigation to client — Nature and extent of preparatory work*

G *Civil Procedure — Summary judgment — Whether triable issue raised — Claim for payment due under contract — Works under contract completed — Whether there was valid reason for appellant to refuse to pay — Whether appellant's defence unlikely to succeed at trial — Whether there was triable issue*

H The appellant/plaintiff was the developer of a hypermall in Kota Kinabalu. The respondent/defendant was commissioned by the appellant to install air conditioning and mechanical ventilation system and services in the hypermall complex. Works had been carried out by the respondent and a sum of RM3,641,315.73 had been certified completed by the appellant. The
I appellant claimed that there were defects and outstanding works not completed by the respondent. The appellant claimed that it received numerous complaints from the owners and tenants in the hypermall about the lack or insufficiency of air conditioning inside the premises. The appellant claimed for losses suffered and costs of rectifying the air conditioning system. The

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respondent counterclaimed for the sum of RM3,641,315.73 for works done. The learned High Court judge ('the judge') allowed the respondent's summary judgment application under O 14 of the Rules of the High Court 1980 ('the RHC') in respect of its counterclaim. The appellant appealed against this decision and against the award of costs against the appellant in the sum of RM80,000 for the summary judgment application. The appellant also complained that the judge erred in allowing a preliminary objection raised by the respondent in respect of the appellant's further affidavit ('the affidavit') which was filed out of time and contrary to O 32 r 13(2)(b) of the RHC.

Held, dismissing the appeal with costs:

(1) All payments, whether interim or final had to be made in accordance with cl 13(b) of the letter of offer dated 24 April 2006 ie all payment must be made to the respondent within 30 days upon certification by the architect. The certification on the payments as submitted by the respondent, were duly certified by the appellant's own mechanical and electrical consultant for the project in question, in accordance with cl 13(b). The respondent had completed the respective works and this was duly certified by the appellant's own consultant. There was no valid reason for the appellant to refuse to pay the balance sum due and owing, as it had been duly certified by its own consultant. The appellant's defence to the respondent's counterclaim was unlikely to succeed in a trial as it raised no triable issue (see paras 16, 18 & 21).

(2) Factors to be considered in awarding costs include, the nature of the claim, its seriousness, the importance of litigation to the client and the nature and extent of the work, that must be done in preparing the matter in question (see para 28).

(3) An appellate court does not interfere in the question of costs without reluctance. The court below has an absolute discretion to deal with the matter. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion by the lower court was based on grounds wholly unconnected with the cause of action. The judge did not make serious error in dealing with the issue of costs and there was no justification for the Court of Appeal to interfere (see para 29).

(4) The appellant had not applied for leave or abridgment of time to file the said affidavit. Furthermore the said affidavit was served after the respondent had served on the appellant's solicitors their submissions and bundle of authorities in respect of the summary judgment application. The judge had correctly exercised his discretion in allowing the preliminary objection and consequently rejecting the said affidavit (see paras 33–34).

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[Bahasa Malaysia summary

Perayu/plaintif adalah pemaju pasar raya besar di Kota Kinabalu. Responden/defendan telah ditugaskan oleh perayu untuk memasang penghawa dingin dan sistem pengudaraan mekanikal dan perkhidmatan di dalam kompleks pasar raya besar. Kerja telah dijalankan oleh responden dan sejumlah RM3,641,315.73 telah disahkan disempurnakan oleh perayu. Perayu mendakwa bahawa terdapat kecacatan dan kerja-kerja tertuggak tidak disiapkan oleh responden. Perayu mendakwa yang ia menerima banyak aduan daripada pemilik dan penyewa pasar raya besar tentang kekurangan dan ketidakcukupan penghawa dingin di dalam premis-premis tersebut. Perayu menuntut untuk kerugian yang ditanggung dan kos pembaikkan sistem penghawa dingin. Responden menuntut balas bagi jumlah RM3,641,515.73 bagi kerja-kerja yang telah disiapkan. Yang Arif hakim Mahkamah Tinggi ('hakim') membenarkan permohonan penghakiman terus responden di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') berkenaan tuntutan balas responden. Perayu merayu terhadap keputusan itu dan terhadap award untuk kos terhadap perayu berjumlah RM80,000 untuk permohonan penghakiman terus. Perayu juga mendakwa bahawa hakim terkhilaf dalam membenarkan bantahan awal dibangkitkan berkenaan afidavit lanjutan perayu ('afidavit') yang mana difailkan selepas melampaui tempoh dan bertentangan dengan A 32 k 13(2)(b) KMT.

Diputuskan, membenarkan rayuan dengan kos:

(1) Semua pembayaran, sama ada interim atau muktamad hendaklah dibuat menurut klausa 13(b) surat tawaran bertarikh 24 April 2006 iaitu kesemua bayaran hendaklah dibuat responden dalam masa 30 hari setelah disahkan oleh arkitek. Pengesahan pembayaran sebagaimana yang diserahkan oleh responden, telah diperakui dengan sewajarnya oleh perunding mekanikal dan elektrikal perayu sendiri untuk projek tersebut, menurut klausa 13(b) responden telah menyiapkan kerja-kerja tersebut dan itu telah diperakui dengan sewajarnya oleh perunding perayu. Tiada alasan yang sah untuk perayu enggan membayar baki jumlah tertunggak dan terhutang, kerana ia telah diperakui dengan sewajarnya oleh perunding perayu sendiri. Pembelaan perayu terhadap tuntutan balas responden tidak mungkin berjaya dalam perbicaraan kerana ia tidak membangkitkan isu yang boleh dibicarakan (lihat perenggan 16, 18 & 21).

(2) Faktor-faktor yang perlu dipertimbangkan dalam mengawardkan kos termasuk, jenis tuntutan, keseriusannya, kepentingan litigasi kepada anak guam dan jenis dan takat kerja, yang perlu dilakukan dalam menyiapkan perkara tersebut (lihat perenggan 28).

(3) Mahkamah rayuan tidak akan campur tangan dalam soal kos tanpa teragak-agak. Mahkamah bawahan mempunyai budi bicara penuh

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untuk menangani perkara tersebut. Mahkamah rayuan tidak sepatutnya campur tangan kecuali ia dapat ditunjukkan bahawa terdapat kesilapan undang-undang atau merupakan budi bicara mahkamah bawahan berdasarkan atas alasan yang langsung tidak berkaitan dengan kausa tindakan. Hakim tidak membuat kesilapan yang serius dalam menangani isu kos dan tiada justifikasi untuk Mahkamah Rayuan campur tangan (lihat perenggan 29).

(4) Perayu tidak memohon untuk kebenaran atau penyingkatan masa untuk memfailkan afidavit tersebut. Tambahan lagi, afidavit tersebut telah diserahkan selepas responden menyerahkan kepada peguam perayu penghujahan dan ikatan autoriti berkenaan dengan permohonan penghakiman terus. Hakim telah dengan betul melaksanakan budi bicara dalam membenarkan bantahan awal dan oleh itu menolak afidavit itu (lihat perenggan 33–34).]

Notes

For cases on affidavit in reply, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 396–419.

For cases on appeal, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2262–2280.

For cases on awards of, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2300–2301.

For cases on whether triable issue raised, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 9355–9595.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (folld)

Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd [2003] 4 MLJ 409; [2003] 3 CLJ 791, CA (refd)

Malaysia International Consultants Sdn Bhd v RR Chelliah Brothers (Didakwa sebagai sebuah firma) [2009] MLJU 107; [2009] 4 CLJ 731, CA (folld)

Perbadaran Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85, CA (refd)

Petrolium Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 14 rr 3(2), 5(1), O 32 r 13(2)(b)

Appeal from: Suit No KK22–104 of 2011 (High Court, Kota Kinabalu)

Norbert Yapp (Eow Ee Pei with him) (Norbert Yapp & Assoc) for the appellant.
Jeyan TM Marimuthu (Claudia A Lopez with him) (J Marimuthu & Partners) for the respondent.

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Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the High Court allowing the respondent's application for summary judgment under O 14 of the RHC 1980 in respect of part of the respondent's counterclaim amounting to RM3,641,315.73 against the appellant.

FACTUAL BACKGROUND

[2] The appellant (which was the plaintiff at the court below) at all material times was a developer of a mixed development project in Sabah and was undertaking a project known as the '1 Borneo Hypermall' in Kota Kinabalu.

[3] The respondent (which was the defendant at the court below) was a company involved in a business of provision of customised system, services and solutions for heating, ventilation and air conditioning. The respondent used green building technology and can custom design building system that operate with maximum energy efficiency.

[4] By a letter of award dated 24 April 2006, the appellant commissioned the respondent to install air-conditioning and mechanical ventilation system and services in the 1 Borneo Hypermall complex. Works have been carried out by the respondent and as at 28 April 2010, a sum of RM3,641,315.73 had been certified completed by the appellant.

[5] The appellant claimed that there were defects and outstanding works not completed by the respondent and the respondent's representations regarding the suitability and fitness for the intended use of the air conditioning system were false. The appellant further claimed that after the complex was completed, possession of retail units was handed over to respective owners and tenants. However, the appellant received numerous complaints from the owners and tenants about the lack or insufficiency of air conditioning inside the premises. Consequently the appellant claimed to have suffered loss and damage ie estimated costs to rectify the air conditioning system and loss of business reputation for a sum of RM50m.

[6] On 5 May 2011 the appellant filed a suit against the respondent for damages to be assessed, special damages of RM50m and liquidated damages at the rate of RM10,000 per day to be calculated from 29 November 2007 to the date of the writ with interest and costs.

[7] On 29 June 2011, the respondent filed its statement of defence and at the same time counter claimed against the appellant for the sum of RM3,641,315.73 for works done, certified and unpaid.

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[8] Thereafter, by a summons in chambers dated 13 September 2011, the respondent applied for summary judgment under O 14 of the RHC 1980, to be entered against the appellant in respect of the said sum of RM3,641,315.73 in its counterclaim against the appellant.

[9] On 16 December 2011, the High Court granted the respondent's aforesaid application and entered judgment against the appellant for the said sum together with interest at the rate of 4%pa from 29 April 2010 till the date of judgment and costs of RM80,000, which sum is subject to review by the court upon application by either party.

[10] Subsequently, on 31 January 2012, upon an application of the appellant pursuant to O14 r 3(2) of the RHC 1980, the High Court granted a stay of execution of the summary judgment until the trial of the appellant's claims against the respondent in the main suit or until further order. The respondent did not appeal against the stay order. The appellant's main suit has been set down for trial on 4–5 July 2013.

[11] In allowing the said summary judgment in favour of the respondent, the learned High Court judge found that the respondent's counterclaim against the appellant was based on certification of the amount claimed by the appellant as well as the audit certification request by the appellant's group accountant. The learned judge concluded that the appellant's defence to the respondent's counterclaim was unlikely to succeed in a trial as it raises no triable issues; and it was a plain and obvious case to grant summary judgment as prayed for by the respondent.

[12] The appellant in its appeal before us, raised the following points:

(a) that the appellant had satisfied the court that there are triable issues and that it deserve its day in court;

(b) that the existence of only one triable issue would automatically prevent the respondent from succeeding in its application for summary judgment;

(c) that the learned judge ought to and should have considered the totality of the documentary evidence and the pleaded case of the appellant instead of relying on the audit confirmation alone when dealing with the respondent's application for summary judgment;

(d) that the respondent was in breach of its obligations to complete the works;

(e) that the goods supplied by the respondent was unfit for their intended purposes;

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(f) that the court must determine whether the polyurethane insulation of the STL tanks which form part of the respondent's counterclaim falls under the TNEC contract with the respondent;

(g) that the alleged interim certification amounting to RM3,641,315.73 was not final and not binding on the appellant having regard to the fact that the project consultant had issued a negative valuation under certificate No 24; and

(h) that the award of RM80,000 as costs against the appellant for a summary judgment application was excessive.

OUR VIEWS

[13] Order 14 r 5(1) of the RHC 1980 provides as follows:

> Where a Defendant to an action begun by writ has served a counter claim on the plaintiff, then, subject, to paragraph (3), the Defendant may, on the ground that the plaintiff has no defence to a claim made in the counter claim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.

[14] Order 14 r 5(1) of the RHC 1980 gives an unfettered right to the respondent to apply for summary judgment on its counterclaim. A counterclaim is an independent action. Where there is a counterclaim, it is, for the purpose of O 14, to be considered in the same manner as the main claim under that order, so that a final judgment may be entered thereunder on a counterclaim as it can on a main claim. Thus O 14 is available in all respects to a defendant with a counterclaim as it is to a plaintiff.

[15] The crucial question to ask would be whether the respondent's application for summary judgment was plain and straight forward. The court must be satisfied on affidavit evidence that the defence to the respondent's counter claim has not only raised an issue but also that the said issue is triable. Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party and denied or disputed by the other in an affidavit; where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the same issue not triable. This guiding principle had clearly been laid out by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC).

[16] In the present case before us, all payments, whether interim or final should be made in accordance with cl 13(b) of the letter of offer dated 24 April

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2006 ie all payment must be made to the respondent within 30 days upon certification by the architect; and the architect shall issue the certificate within 14 days from the date of submission of the respondent's claim. Clause 13(b) provides:

> 13(b) Payments, whether Interim or Final shall be made as per requirement for any work, equipment or materials delivered to site and shall be effected to you within 30 days upon certification by the Architect ('the Certificate'). The Architect shall issue the Certificate within 14 days from the date of submission of your claim. Evaluation of any claims and payments shall be based on completion of each zone for each floor level.

[17] Here, the certification on the payments as submitted by the respondent, were duly certified by the appellant's own consultant, Messrs JSPEC Sdn Bhd who were the appellant's appointed mechanical and electrical consultant for the project in question, in accordance with cl 13(b). The affidavit evidence showed that the respondent had completed the respective works, based on completion of each zone for each floor level. This had been duly certified by the appellant's own consultant.

[18] During the period beginning 6 December 2006 to 29 April 2010, numerous payment certificates were issued certifying sums due and owing to the respondent by the appellant. The appellant had intermittently made partial payments towards the certified sum owing. There is no valid reason for the appellant to refuse to pay the balance sum due and owing, as it had been duly certified by its own consultant, JSPEC.

[19] The learned judge also relied on the audit certification request dated 21 June 2010 made by the appellant's group accountant. Paragraph 1 of the said audit certification reads: 'Our auditors are now engaged in an examination of our financial statements. In this connection, they wish to confirm the balance due from on your account at 31 December 2010, which was shown in our record as RM3,887,555.12'.

[20] In short, the significance of the audit certification request can be seen from the statement contained therein. It specifically states that in the appellant's financial book, the amount due to the respondent is RM3,887,555.12. This is a clear admission of debt based on the amount stated as at the date 31 December 2010. An audit confirmation request is an important step in an audit of a company's financial accounts. It is a way of ensuring that the amount as appears in the company's book is correct and the only manner to confirm this amount is by way of confirmation by the creditor concerned.

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[21] Based on the above documents, namely the certification of payments by the appellant's appointed consultant, Messrs JSPEC and the audit confirmation request by the appellant's group accountant, we are satisfied that the learned High Court judge was correct in coming to a conclusion that the appellant's defence to the respondent's counterclaim is unlikely to succeed in a trial as it raises no triable issue. We are in agreement with such findings and find no reason to disturb it. To us, the position is clear ie upon certification by the appellant's consultant payment must be made to the respondent. The certification was confirmed by the appellant's itself when it issued an audit confirmation request. The authenticity of the audit confirmation request issued by the appellant is not in dispute in view of those documents above, the appellant cannot possibly deny the same.

[22] The appellant was saying that the leaned High Court judge was wrong in holding that the appellant had in fact certified the respondent's claim. We find that it is clear from the evidence that the learned judge had rightly found that at no time did the appellant deny that there had been various certifications by them of the respondent's claim.

[23] The appellant argued that the original certifications by its consultant were incorrect and this had been remedied by the reversal of certification dated 24 April 2010. Our view is that the reversal is a non-starter. The audit confirmation request was issued on 21 June 2011, after the purported reversal of the respondent's certified claim dated 24 April 2010. The natural inference is that the audit certification figures supersede the reversal amount. It is no answer for the appellant to say that its group accountant did not know about the reversal.

[24] The appellant also claimed that the respondent had wrongfully stopped work and this vitiates its counter claim. We find this contention is without basis. Clause 3(d) of the letter of award (as amended under the agreement dated 5 September 2011) reads as follows:

> 13(d) SAGAJUTA further agrees and undertakes that any failure on its part to make payment to TRANE of the certified sum will result in, and it shall be lawful for TRANE of forthwith suspend all work and deliveries. TRANE is at liberty to use such lawful means to recover from SAGAJUTA all outstanding claims and expenses including amounts retained by SAGAJUTA under the Retention Sum, without being held liable for any consequences of the work stoppage hereunder.

[25] Clause 13(d) is clear on the point. The appellant's contention that the respondent has breached the contract by suspending all works and deliveries is groundless. The wordings of cl 13(d) speak for themselves, that the respondent should not be held liable for any work stoppage arising out of the appellant's failure to pay certified sum due and owing. Again, we find there is no triable

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issue relating to this point. It was caused by the appellant's own default or failure to pay the respondent of the said sum due and owing.

[26] As evidenced by the certifications for payments issued by the appellant's own consultant, the respondent had completed its work as expected under the letter of award. The respondent cannot be said to have failed to carry out the works with due diligence or failed to comply with the expected requirements, and that it had called upon the appellant to remedy the same could not stand. Therefore the respondent was clearly entitled to payment as certified and the appellant ought to pay the certified sum.

[27] The appellant claimed it had reversed the certification for payment certificate No 24 in the sum of RM1,750,000 for the polyurethane insulation of the STL tanks. The appellant claimed that the said matter falls under the TNEC contract with the appellant, based on the letter dated 23 April 2010 from TNEC. However, by a letter dated 7 May 2010, TNEC retracted the earlier letter dated 23 April 2010 and confirmed that the polyurethane insulation of the STL tanks was under of the respondent's contract with the appellant, and not under TNEC scope. The appellant's reliance on this ground is clearly misleading and devoid of merit. As such the respondent was entitled to claim the said sum of RM1,750,000 which was certified by the appellant's consultant as part of the amount RM3,641,315.73 debt due and owing by the appellant to the respondent. The purported reversal of the respondent's claim for the sum certified is clearly without basis.

[28] The appellant also complained about the RM80,000 costs awarded by the learned High Court judge as being too excessive. On this issue, we find guidance in the decision of the Court of Appeal in *Malaysia International Consultants Sdn Bhd v RR Chelliah Brothers (Didakwa sebagai sebuah firma)* [2009] MLJU 107; [2009] 4 CLJ 731, that factors to be considered in awarding costs include, the nature of the claim, its seriousness, the importance of litigation to the client and the nature and extent of the work, that must be done in preparing the matter in question.

[29] An appellate court does not interfere in the question of costs without reluctance. The court below has an absolute discretion to deal with the matter. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion by the lower court was based on grounds wholly unconnected with the cause of action, (see *Petrolium Nasional Bhd (Petronas) & Anor v Cheah Kam Chew* [1987] 1 MLJ 25).

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[30] In the present case the learned High Court judge did not make serious error in dealing with the issue of costs and therefore there is no justification for us to interfere.

[31] The appellant also complained that the learned High Court judge erred in law in allowing a preliminary objection raised by the respondent in respect of the appellant's further affidavit dated 7 December 2011. The preliminary objection was raised by the respondent, in respect of the appellant's further affidavit served on the respondent's solicitors in court on 7 December 2011, a day after the respondent filed and served its submissions on the O 14 application and bundle of authorities on the appellant's solicitors. The ground of the preliminary objection was that the said affidavit was clearly out of time to reply the respondent's affidavit in support which was filed and served on the appellant on 13 September 2011. It was to supplement the appellant's earlier affidavit in opposition which was served on the respondent on 14 October 2011. The said affidavit was filed more than 21 days had lapsed. This is contrary to O 32 r 13(2)(b) of the Rules of the High Court 1980 (the applicable rules then) which provides that 'a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.'

[32] In *Perbadaran Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85, the Court of Appeal held that O 32 r 13(2) makes it mandatory for such an affidavit in reply to be filed and served within 14 days from the time the affidavit it seeks to reply is received. It was also held in that case that the court has no discretion to allow such an affidavit in reply if it is filed outside the 14 days period, unless the party in question apply for an abridgement of time required to file the affidavit in reply pursuant to O 3 r 5(1) of the RHC 1980.

[33] In the present case, the appellant had not applied for leave or abridgment of time to file the said affidavit in reply. Furthermore the said further affidavit in reply in question was served after the respondent had served on the appellant's solicitors their submissions and bundle of authorities in respect of the summary judgment application. The Court of Appeal, in *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409; [2003] 3 CLJ 791 had stressed the following point:

> We were wondering how the respondent was allowed to file and use that affidavit. It is to be noted that the proceedings of this application are by way of affidavit evidence. As such in our view when the parties begin their submission the evidence by way of affidavits is deemed to be closed and the parties are only allowed to submit on the evidence was found in the various affidavits.

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[34] The learned High Court judge in the present case, had correctly exercised his discretion in allowing the preliminary objection raised by the respondent and consequently rejecting the said further affidavit filed by the appellant. There is no justification for us to interfere.

CONCLUSION

[35] The learned High Court judge was right in exercising his discretion to allow the respondent's application for summary judgment in respect of its counter claim against the appellant. He had duly considered the relevant laws and facts in coming to hid decision we find no reason to interfere with his decision.

[36] We therefore affirm the decision of the learned High Court judge and accordingly dismiss the appeal with costs of RM10,000 to the respondent and make an order that the deposit be refunded to the appellant.

Appeal dismissed with costs.

Reported by Kanesh Sundrum